Final Report of Audit on the Establishment of the National Environmental Supercomputing Facility in Bay City, Michigan

EPA Office of Inspector General

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CHAPTER 1
INTRODUCTION

PURPOSE

We performed an audit on the establishment of the National Environmental Supercomputing Center (NESC) located in Bay City, Michigan. The purpose of this audit was to determine whether EPA complied with applicable laws and regulations and whether excessive costs were incurred.

BACKGROUND

The National Data Processing Division (NDPD), of the Agency's Office of Administration and Resources Management (OARM), began planning the acquisition of a supercomputer in 1988. This plan envisioned placing the supercomputer in Research Triangle Park, North Carolina, where other Agency computer operations are located. An August 15, 1989, study concluded that a Government-owned, contractor-operated facility would be more cost-effective than a contractor-owned, contractor-operated facility. However, the Agency, despite several attempts, could not acquire the needed funding for the project.

On June 26, 1990, the House of Representatives passed the, "Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriation Bill, 1991." This bill included funding for a supercomputer for EPA's regional acid deposition monitoring (RADM) program. This program, operated by the Atmospheric Research and Exposure Assessment Laboratory in Research Triangle Park, North Carolina, was developed to model the cause and effect relationship between sources of air pollution and the resulting quantities, locations, timing, and the resulting types of acidic deposition. The bill also included funding for an EPA Center for Ecology Research and Training (CERT) to be established in Bay City, Michigan. The bill's provision specifically provided:

$9,700,000 of which $8,700,000 is for the lease/purchase of a dedicated class VII supercomputer to support the regional acid deposition monitoring program, and $1,000,000 for planning and site acquisition for a new EPA Center for Ecology Research and Training to be established in Bay City, Michigan.

Subsequently, the Senate passed its appropriation bill which did not concur with the money for the computer, or with the center to be located in Bay City, Michigan. The House-Senate conference committee report that

reconciled the two bills stated, "The conferees agree to siting and acquisition of the computer . . . in the Bay City, MI, vicinity." On November 5, 1990, Congress passed Public Law 101-507, providing Abatement, Compliance and Control (AC&C) funds for the computer and the CERT. Congress also stipulated:

That notwithstanding any other provision of law, the lease or purchase of a computer, from funds appropriated under this paragraph, to support the regional acid deposition monitoring program, and the planning and site acquisition for a new EPA Center for Ecology Research and Training, shall be established in the Bay City, Michigan vicinity. . . .

Congress earmarked $8.7 million for the lease or purchase of the computer in Conference Report 101-900 for fiscal year 1991, but did not grant authority or funds for EPA to acquire a facility to house it. Because EPA did not have a facility in the vicinity of Bay City, it consulted with its Office of General Counsel and Facilities Management Services Division. As a result, EPA decided to task a contractor to provide the computing services and to acquire the use of a facility as "incidental" to providing these services (this contractor had been awarded a contract in 1987 to operate and support EPA computers). However, documentation in regard to this decision was not maintained.

On May 28-30, 1991, EPA's contractor advertised in a local Bay City newspaper for 14,000 square feet of space to be situated in Bay City. On June 25, a "development partnership" submitted the only response to the advertisement. The developer offered to lease to EPA's contractor a building built in 1910 that would require extensive renovations to meet current local codes. Upon accepting the offer, the contractor hired a subcontractor to design the facility and mechanical and electrical equipment supporting the computer. The work was added to the contract by a modification dated August 30, 1991. After the design was drafted, the contractor and the developer executed a five-year lease on October 31, 1991.

On November 1, 1991, the developer purchased the building from its previous owner. On December 2, 1991, EPA's Contracting Officer consented to the lease as a subcontract under the Agency's prime contract for computer support services. Over the course of the next year the NESC building underwent extensive renovations. The supercomputer was delivered in August 1992 and unveiled to the public in a dedication ceremony in October 1992.

On July 27, 1995, the provision of Public Law 101-507 that had required the computer to be located in the Bay City, Michigan vicinity was rescinded by Congress.

SCOPE AND METHODOLOGY

Our audit was initiated to address concerns regarding the possible misuse of appropriated funds and violations of laws, regulations, rules, policy, and procedures. We examined EPA's contract activity related to the establishment of the NESC. We did not examine the functions, operations, and services of the NESC and EPA's management controls taken as a whole. Our audit fieldwork was conducted between May 16, 1994 and March 8, 1996.

Except as discussed below, we performed the audit in accordance with *Government Auditing Standards*, 1994 Revision promulgated by the Comptroller General of the United States. We reviewed sections of OARM's reviews in support of EPA's 1993 Integrity Act Report to the President and Congress, as required by the Federal Managers' Financial Integrity Act, in planning our audit. Our examination included tests of documents and other auditing procedures we considered necessary. We issued a draft report on August 6, 1996. We received a response from the Acting Assistant Administrator OARM on September 20, 1996. Although the response

disputed many of the issues raised in our draft report, OARM stated that it was in general agreement with the recommendations of the report. We reviewed the response and made changes in our report as warranted. However, we did not materially change our position. The response can be found in its entirety in Appendix III. Due to the length of the response, we addressed the Agency's comments on our findings and recommendations, including our evaluation of their comments, after the Chapter's recommendation section.

On September 30, 1996, an exit conference was held with Agency senior managers from OARM and the Office of General Counsel.

SCOPE IMPAIRMENTS

We were unable to interview a contractor employee who: (a) managed the solicitation and negotiation of the subcontract to lease the NESC building facility; and (b) participated in planning the renovation of the facility. Nor were we able to gain a complete understanding of the solicitation and negotiation of the subcontract and the renovation of the facility by other auditing procedures.

Contrary to law, EPA also failed to make and preserve documentation. This situation impeded our audit to the extent that the majority of the documents we used to reconstruct the establishment of the NESC were provided through subpoenas of contractors, subcontractors, and other organizations; not by EPA.

AGENCY COMMENTS ON SCOPE IMPAIRMENTS

We do not disagree that the Office of Inspector General's(OIG) inability to interview a contractor employee involved in the subcontracting and renovation of the Kahn building has limited the Agency's understanding of the establishment of the NESC.

The report, however, reflects a misunderstanding regarding the Agency's willingness to assist the OIG in this regard. While, as previously communicated to OIG, EPA cannot, under its contract with [the contractor], compel the contractor to make a specific employee available for interview by the OIG. The Office of Acquisition Management (OAM) has recently written [the contractor] to urge participation by its employee in the interview with the OIG in the hope of facilitating the investigation. The contractor was requested to respond to OAM's letter by October 3, 1996.

OIG EVALUATION

We acknowledge the Agency's position that they cannot compel the contractor to make a specific employee available for interview. Also, we appreciate OAM writing to the contractor to urge their employee to consent to the interview.

AUDIT COVERAGE

This audit covered EPA's involvement in the establishment of the NESC from October 1, 1990 through December 31, 1992. The audit also included contracts and EPA actions to establish the CERT that were related to EPA's involvement in the establishment of the NESC. In addition to EPA records, we also examined the records of contractors, subcontractors , and commercial organizations. Audit work performed at Agency organizations included: the Office for Administration and Resources Management; the National Data Processing Division; the Office of Acquisition Management; the Office of General Counsel; the Facilities Management and Services Division; the Office of Administration; the Office of Information Resources Management; the Cost Advisory and Financial Analysis Division; the Budget Division; the Financial Management Division; the Research Triangle Park Financial Management Center; and the Office of Grants and Debarment. We conducted interviews and other fieldwork at the following locations during our audit.

San Francisco, California

Washington, D.C.

Beltsville, Maryland

Laurel, Maryland

Rockville, Maryland

Bay City, Michigan

Detroit, Michigan

Lewistown, Michigan

Midland, Michigan

Saginaw, Michigan

Omaha, Nebraska

Durham, North Carolina

Raleigh, North Carolina

Research Triangle Park, NC

McLean, Virginia

We interviewed 70 individuals including: current and former EPA contracting officers; current and former EPA managers; current and former contractor personnel; current and former subcontractor personnel; local Bay City Government officials; personnel at various commercial organizations; and, private citizens. We also issued 13 subpoenas to obtain data from the contractor, subcontractors, and other commercial organizations. We examined the records identified in the following table

EPA	Contractor, Subcontractor, and Other Commercial Organizations
Contract Documents	Financial Documents
Contract Modifications	Contract Documents
Contractor Proposals	Consulting Agreements
Contract Management Work Plans	Leases
Financial Management Reports	Planning and Budget Documents
Award Fee Performance Reports	Property Filing Documents
Project Work Authorizations	Real Estate Documents
Contract Deliverables	Appraisal Reports
Planning and Budget Documents	Government Property Lists

Realty Acquisition Documents	Bankruptcy Filing Documents
Correspondence	Photographs
Brochures	Video Tapes
Visitor Registers	Correspondence
Project Status Reports	Meeting Minutes
Travel Documents	Policies and Procedures
Policies and Procedures	Periodicals and Publications

Our audit disclosed several areas requiring improvement, as well as violations of laws and regulations that are discussed in this report. Recommendations are provided to assist the Agency in improving those areas. We examined applicable management controls and procedures specifically related to our audit objectives; however, we did not test all of EPA's controls. Any material internal control weaknesses disclosed and related recommendations to strengthen controls are included in Chapters 2 through 6.

CHAPTER 2
EPA CIRCUMVENTED GSA TO ACQUIRE THE BUILDING

The Agency acquired the use of an office building for the NESC through a contractor. However, Public Law and implementing regulations vest most authority for acquiring office space for Government agencies with the General Services Administration (GSA). An Agency must have specific legislative authority to obtain office space independent of GSA. EPA did not have such authority; therefore, it violated Public Law by using its contractor to acquire the building for Agency use.

EPA representatives provided various explanations why this occurred including: (a) EPA was not obligated to utilize GSA because obtaining the space was merely "incident" to the contractor's primary role of providing computer support services; (b) the type of appropriation to fund the supercomputer precluded GSA involvement; (c) EPA could task the contractor to acquire space as long as it was not occupied by Government personnel; and (d) GSA would not have obtained the space in a timely manner. We disagree with these explanations. The law does not recognize the legitimacy of some, the facts do not support the rest. Thus, no legally sufficient explanation exists for EPA's circumvention of GSA. A fundamental precept of Government operation is that an Agency cannot do indirectly what it is not permitted to do directly. Thus, EPA should not have used the contract to accomplish a purpose it could not do by direct expenditure.

We also determined that had EPA engaged the services of GSA and bought the building, the Agency could have saved approximately $3.8 million over the 5 year lease period.

RELEVANT LAWS AND REGULATIONS

There are various laws, regulations, and principles that pertain to this issue. The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490) transferred all functions of leasing and managing building space for use by Government agencies to the Administrator of General Services in 1950. The Federal Property Management Regulations, 41 Code of Federal Regulations (CFR) 101-18.101 (1990) implement the Act with similar provisions. Title 41 U.S.C. 14 prohibits the purchase of land for the United States unless a law authorizes the purchase. Court cases have held that this section also applies to leasing real estate. The United States General Accounting Office *Principles of Federal Appropriations Law* (page 4-5) stipulates that an

agency cannot do indirectly what it is not permitted to do directly. Thus, an agency cannot use the device of a contract to accomplish a purpose it could not do by direct expenditure.

Standards for Internal Controls issued by the Comptroller General include the following standards:

- Managers and employees are to have personal and professional integrity and are to maintain a level of competence that allows them to accomplish their assigned duties, as well as understand the importance of developing and implementing good internal controls.
- Transactions and other significant events are to be promptly recorded and properly classified.
- Qualified and continuous supervision is to be provided to ensure that internal control objectives are achieved.

The June 21, 1995, revision to Office of Management and Budget (OMB) Circular Number A-123 states:

> As Federal employees develop and implement strategies for re-engineering agency programs and operations, they should design management structures that help ensure accountability for results, and include appropriate, cost-effective controls.

I - EPA Circumvented GSA to Establish a Facility for Agency Use

Rather than obtain office space through GSA as required, EPA acquired its NESC building through one of its prime contractors. Project Work Authorization 98-91 (dated February 12, 1991) tasked this contractor to "Establish and Staff Bay City Super Computing Facility." Project Work Authorization 22-92 (dated November 22, 1991) tasked the same contractor to "Provide staff, facility, supplies and other support as necessary to implement and operate an EPA Supercomputer Center at Bay City." In our opinion, the Agency used its contractor to acquire a building for its own use.

The Agency, on the other hand, contended that it did not have to go through GSA because the building was acquired as part of "computer support services" under the contract. In 1992, according to the Agency's Office of General Counsel, "[T]he lease of the . . . facility to house the Supercomputer was incident to the provision of computer support services." In effect, EPA argued that it was buying "computer modeling" and that the contractor needed a building within which to "model."

We disagree that the building was merely incidental to "computer support services." The acquisition of the building was a significant part of the work performed in Bay City. The contractor was tasked to "Establish and Staff Bay City Super Computing Facility" and "[T]o implement and operate an EPA Supercomputer Center . . .", not provide "computer support services." Therefore, rather than being a contractor building for computer operations, this building was established as an EPA center for EPA purposes. Moreover, other Agency actions also contradicted the notion that the NESC was merely a contractor building used to provide computer support services to EPA:

- The Director of the NESC, an EPA employee, was on site for over three years. During our audit; however, he was moved off site after the Agency determined that obtaining office space for a Government employee under this contract was improper. The assignment of the EPA employee demonstrates that the facility was for the Agency's use.
- As will be explained in Chapter 3, the Agency pre-selected the building it wanted and then instructed the contractor to go and lease it.
- EPA dictated the length of the lease, not the contractor. Furthermore, the binding commitment was for 5 years with 5 one-year options - while the contract itself had only 11 months until expiration.
- The bulk of the contractor's effort involved renovating the building. The contractor provided virtually no "computer support service," because the supercomputer was not delivered until five weeks before the contract was due to expire. The contract was extended three months to allow the contractor to complete the renovation.

- EPA took steps to ensure that the building would be available for EPA's use no matter who the contractor was. The Agency directed that the lease restrict assignment only to EPA contractors. An OAM official explained, "We wanted the building. We insisted on [the restriction]." Furthermore, EPA's solicitation for the successor contract required bidders to add approximately $3.8 million to their bids for termination of the Kahn building lease if the lease was not assumed.
- **EPA directed the installation of special features including a video conferencing room, a training center, and an auditorium to be used as a visitor center. It would be unlikely that a contractor buying computer services for itself would invest in such extra features in someone else's building.**
- **The Agency directed that building security and telecommunications be compatible with other Agency facilities. With proper authorization, the NESC security access cards can be used at various EPA sites including Research Triangle Park, North Carolina. The telecommunications services used Federal Telecommunications System 2000--the Government's system. Such compatibility indicates that the building was for EPA use and not merely a contractor building for computing services.**
- **EPA openly proclaimed the building as its own. For example, the Office of Administration identified the NESC as an EPA facility in a presentation to the Administrator entitled, "EPA Buildings and Facilities." The NESC building signs prominently include the EPA and NESC logo. The NESC FY 1993 Annual Report explained that the facility was established by the EPA as "our computing facility."**

  OAM defended tasking the contractor to lease the building with a Federal Acquisition Regulation (FAR) provision addressing Government-operated facilities. OAM asserted:

  [P]ursuant to FAR 45.302-3, the lease of the building was within the scope of the contract because the services and the facilities were used in connection with the operation of the National Computer Center.

FAR 45.302-3 states that facilities may be provided to a contractor when, *"the contract is for work within an establishment or installation operated by the Government."* (Italics added.)

II - Rationale For Circumventing GSA

Interviews with, and written statements from, Office of Administration and Resources Management (including OAM and the Facilities Management and Services Division) and Office of General Counsel (OGC) officials yielded conflicting reasons why the Agency bypassed GSA. OARM officials asserted that they could not have used GSA because the supercomputer project funds Congress appropriated were part of the Abatement, Control and Compliance (AC&C) appropriation. According to OARM officials AC&C funds could not be used for intramural (EPA internal) activities, including GSA rent for office space. Other OARM officials claimed that although GSA was an option, GSA would not have been able to complete the project within the two year life span of the funds appropriated by Congress. In addition, OARM and OGC officials gave conflicting accounts as to how the decision to bypass GSA came about.

In the first instance, the explanation that AC&C funds could not have been used for GSA rent was not only contradicted by most of the other EPA officials interviewed, but also by EPA practices. The Agency used AC&C funds to pay GSA rent for other facilities since the Bay City project began in Fiscal Year 1991. Admittedly, a 1987 EPA directive did prohibit using AC&C funds for intramural activities such as GSA facility rent. However, this same directive also prohibited using these funds on any part of the contract that EPA used to acquire the NESC building. In any case, the point is moot because concurrent Congressional changes to EPA's appropriation structure made the directive outdated. Thus, AC&C funds could have been used to pay GSA.

In the second instance, the Federal Property and Administrative Services Act of 1949 prohibits agencies from obtaining their own space. There is no exemption for time constraints. Moreover, no EPA official ever contacted the GSA to determine how long it would have taken to obtain a suitable facility for the supercomputer. Although several OARM officials said they thought others within EPA had contacted GSA, we found no documentation whatsoever to support that any such discussions with GSA had ever taken place.

Finally, EPA employees made conflicting statements regarding the decision to have the contractor rather than GSA obtain a facility to house the supercomputer. In general, OGC representatives maintained that:

- **Their involvement in the issue was limited.**
- **They had recommended <u>against</u> obtaining the facility under the contract.**
- **Their recommendation was overridden by OARM.**

An OARM representative informed us that:

- **OGC was involved with the plan to have the contractor obtain the building.**
- **OGC did not take exception to the plan; if they had, he would <u>not</u> have gone against their advice.**

The Facilities Management and Services Division (FMSD) representative informed us that:

- **The decision to use the contractor had already been made <u>before</u> FMSD became involved.**
- **EPA should have obtained the use of the facility through GSA.**

On the other hand, OAM representatives provided statements that conflicted with those made by both OGC and FMSD. These included:

- **The decision to have the contractor acquire space was made <u>after</u> several phone conversations and a meeting with OGC.**
- **OGC gave them the very clear impression that the contractor could obtain the space as long as it was within the scope of the contract, and the space was not for additional office space for Government employees.**
- **OGC provided guidance on how the renovation costs should be included in the lease.**
- **It was the FMSD employee that eliminated GSA from consideration.**

We were unable to establish the veracity of any of these statements, because none of the individuals involved were able to submit any documentation in support of their assertions.

III - Lease Versus Purchase

EPA officials not only violated the law, they were inefficient in the process. It cost the Government more to renovate and lease the building than it would have to purchase a comparable building. We estimate that had EPA engaged the services of GSA and bought the building, the Agency could have saved approximately $3.8 million over the five-year lease period. Specifically, EPA will pay $4.1 million in rent, whereas the estimated cost of Government ownership would be $300,000 over the same five-year period. ***(The $300,000 estimate is based on a total estimated cost of ownership, including Kahn building purchase and renovation costs. The estimate is developed by dividing the total $2,188,000 by the 40 year estimated life of the building to estimate the cost of ownership per year. The yearly cost of ownership, approximately $55,000, is multiplied by the five years of the lease to develop the $300,000 estimate.)*** **Furthermore, the Government would then have owned a building.**

EPA realized contractor acquisition was more expensive than Government acquisition long before the project began. EPA tasked another contractor to study supercomputer facility options for Research Triangle Park (RTP), North Carolina in 1989. The study concluded that when the same interest was acquired, be it lease or purchase, Government acquisition was less expensive because contractor indirect expense rates and fees were not added. The study did not compare lease cost to purchase cost.

We estimate that the building owners recouped all their costs by August, 1995, thus leaving as profit $1.4 million, the payments over the 20 months remaining on the lease. A portion of this profit resulted from EPA directing the contractor to accelerate payment of all general renovation costs. Normally these costs would be spread over the life of the renovations, or over the 40-year life of the building, whichever is less; however, EPA directed that the costs be spread over the 5-year lease period. Consequently, the building owners received excess profit. Furthermore, at the end of the lease period, the owners will have a virtually new building--fully renovated at Government expense--while EPA will either have to sign a new lease, or obtain space at another facility.

As explained in Chapter 3 of this report, a second facility existed, which had been described by an Agency official as a "state-of-the-art computer center." It was sold for $900,000, less than two years after the Agency rejected it.

IV - Internal Controls

The actions taken by EPA officials represent an internal control failure. Government employees are required to follow Standards for Internal Controls issued by the Comptroller General to help prevent illegal, unauthorized, and questionable acts. These standards require managers and employees to maintain a level of competence that allows them to accomplish their assigned duties, as well as to understand the importance of developing and implementing good internal controls. The standards also require transactions and other significant events be promptly recorded and properly classified. Moreover, a June 21, 1995, revision to Office of Management and Budget (OMB) Circular Number A-123 states that Federal employees should design management structures that help ensure accountability for results, and include appropriate, cost-effective controls when developing and implementing strategies for re-engineering agency programs and operations.

In regard to the NESC establishment, EPA officials did not accomplish their assigned duties in compliance with laws and regulations. They also did not record transactions and significant events. Consequently, accountability for decisions and results was not maintained.

CONCLUSION

The Agency violated the law and circumvented GSA by instructing one of its contractors to lease a building for the supercomputing center. This occurred because EPA personnel were either uninformed of, or indifferent to, the criterion governing the lease of office space. Moreover, these Agency employees did not comply with the standards for internal controls issued by the Comptroller General in that assigned transactions and significant events were not promptly recorded, accountability was not maintained, and internal control objectives were not achieved.

RECOMMENDATIONS

We recommend the Deputy Administrator:

2-1) Provide training to senior-level managers on the uses and limitations of appropriations.

2-2) Hold senior managers accountable for ensuring documented management controls are in place and followed in accordance with OMB Circular Number A-123.

We recommend the Acting Assistant Administrator for Administration and Resources Management:

2-3) Contact GSA to obtain facilities for the National Environmental Supercomputing Center in accordance with law and regulations.

2-4) Determine if required facilities will be available at reasonable cost in accordance with law and regulation when EPA's access to the current space expires.

2-5) Review all office and other space arrangements where costs are charged direct to contracts, and ensure the space arrangements were established and are managed in compliance with law and regulation. We further recommend we be asked to review and provide input, as appropriate, to the review plan; and be provided copies of all reviews.

2-6) Provide training to OARM officials on: the Federal Property and Administrative Services Act of 1949; Title 41 US Code, Section 14; and, the Federal Property Management Regulations to ensure that future office and other space arrangements are obtained properly.

AGENCY COMMENTS AND OIG EVALUATION

The response by OARM disputed many of the issues in this chapter, but generally agreed with our recommendations. Based on the response, we changed recommendation 2-3 (draft report recommendation 2-1) and inserted a new recommendation 2-4. We now recommend that the Agency: (a) contact GSA to obtain supercomputing facilities; and (b) ensure the facilities are available at reasonable cost when EPA's access to the current space expires. Otherwise, we did not materially change our position. The response in its entirety is contained in Appendix III.

OARM asserted that at the time the Agency opted to use its contractor to acquire the use of the building, Agency officials legitimately believed that a contract could serve as an acceptable alternative to acquiring space through GSA. This decision "[W]as based on the Agency's lack of legal authority to acquire a facility and its recognition that utilization of the General Services Administration's (GSA's) acquisition process would entail a number of months." We agree. EPA does lack the legal authority to acquire a facility--such authority rests with GSA. We also agree that going to GSA would probably have entailed "a number of months" to acquire a facility. However, as previously mentioned, no EPA official ever contacted GSA to determine how long it would have taken to obtain a suitable facility for the supercomputer. Moreover, there is no exemption for time constraints to the Federal Property and Administrative Services Act.

OARM also stated that, "[I]t is not improper for agencies to require contractors to lease space in performance of a contract," and provided three Comptroller General decisions to support this assertion. We reviewed these decisions and concluded that they were not relevant. In two of the decisions, the contractual situations differed vastly from the EPA situation; in the third instance, an Office of General Counsel attorney informed us that the decision had been cited in error.

OARM further stated that the FAR requires contractors to obtain facilities necessary to perform Government contracts. We agree. However, we do not agree that this requirement extends to Government space requirements. We also do not agree with the implication that space leased by the contractor for Government use is somehow exempt from the Federal Property Management Regulations. The law (41 U. S. C. 14) stipulates that, "No land shall be purchased on account of the United States, except under a law authorizing such purchase." Court cases have held that this prohibition extends to lease of real estate.

The OARM response stated that using AC&C funds precluded going through the GSA to obtain space. We did not discuss this issue in detail in our draft report, because it was never mentioned as a justification by any of the principal participants in the establishment of the NESC, nor was it cited in any contemporaneously prepared documentation. Only two EPA officials mentioned AC&C limitations as a reason not to go to GSA during our interviews, and these officials said they had little involvement with the establishment of the NESC.

In any case, OARM's explanation of the use of AC&C funding is contradictory. OARM stated that EPA was prohibited from using these funds to pay for an "intramural" activity such as paying rent to GSA for the NESC. It should be pointed out however, that EPA used "intramural" (salary and expense) funds to pay for ADP support on the NESC contract. Moreover, the classification of activities as "intramural" is only an EPA policy that the Agency itself has admitted is confusing. For example, in a December 1988 letter to the Office of Management and Budget, EPA described its plan to implement a new accounting system:

> **Also included in this plan is the elimination of the terms "intramural" and "extramural" from the budgeting process. These are EPA expressions, based on object class definitions, which are not used government-wide and which are frequently misunderstood within EPA.**

Attached to OARM's response, were documents that purported to show that no AC&C funds were used to pay rent to GSA. We compared these documents to the actual expenditures reported in EPA's budget to Congress. We were unable to reconcile these documents. As such, we could not substantiate OARM's statement that the use of AC&C funds precluded them from going through GSA.

OARM defended the use of AC&C funds by stating that EPA was specifically directed and authorized by Congress to use these funds for the supercomputer. We agree. However, Congress did not authorize EPA to use these funds to obtain the use of a facility.

o disputed our positions in regard to both the lease and the renovation of the Kahn building. Nonetheless, we stand by our original positions. OARM also questioned the cost savings that may have been realized had EPA obtained the use of the alternate site, i.e., the existing computer center. The response maintained that this site would have required extensive renovation to bring it up to the minimum standards for housing a supercomputer. In rebuttal, we would offer the following two statements. First, according to the OARM-RTP Director, this site was:

> **[A] 24,000 square feet state-of-the-art computer center. It would be the envy of every computer center director or facility manager who saw it.**

Second, in a letter from the Chairman of EPA's House Appropriation Subcommittee to the owner, the Congressman stated:

> **This is to confirm our recent conversation regarding the possible procurement by the U.S. Environmental Protection Agency of a supercomputer to be housed in Bay City.**
> **[T]he [name deleted] facility has been visited by officials of the University of Michigan; and they have indicated that the facility is very well suited to the needs of proper maintenance and operation of a supercomputer. You may expect future visits from U of M and EPA officials in the near future for a further on-site inspection of the facility.**

The response indicates that an OARM study, due for completion in December 1996, will determine the best way to obtain high performance computing support in the future. Nonetheless, we are concerned that this study will not enable the Agency to move its equipment in a timely manner, as the current lease will expire in April 1997. Consequently, we believe that EPA should contact GSA as soon as possible.

OARM Response to Recommendation 2-1

(Draft Report 2-4)

OARM agreed that Senior Resource Officials will benefit from training regarding the uses and limitations of appropriations. Such training will be provided in FY 1997.

OIG Evaluation

The planned training should achieve the intent of the recommendation. No further action is required.

OARM Response to Recommendation 2-2

(Draft Report 2-5)

OARM agreed that senior Federal managers should be accountable for taking systematic and proactive measures to develop and implement cost-effective management controls.

OIG Evaluation

OARM's concurrence is noted. EPA by holding its senior managers accountable will help alleviate the problem. No further action is required.

OARM Response to Recommendation 2-5 (Draft Report 2-2)

During FY 1997, OAM will review, by program office, a representative sample of contracts likely to have such office or other space arrangements, to ensure they were established and are managed in compliance with law and regulation.

OIG Evaluation

The action planned by OAM should help alleviate the problem. We request that OAM forward to us a list of the contracts it plans to review, as well as the results of its review.

OARM Response to Recommendation 2-6

(Draft Report 2-3)

OARM agreed that some training or dissemination of information regarding the cited Act and regulations would be beneficial to EPA managers, including contracting and project officers. OARM stated that it would determine an appropriate forum and mechanism for providing the training or distributing the relevant information during 1997.

OIG Evaluation

OARM's response did not meet the intent of the recommendation. In light of the gravity of the issue, we believe that OARM's plan of action is too vague. Thus, we reiterate that the Agency needs to provide training--not disseminate information--to OARM officials on the Federal Property and Administrative Services Act of 1949; Title 41 US Code, Section 14; and, the Federal Property Management Regulations to ensure that future office and other space arrangements are obtained properly.

CHAPTER 3
EPA PRE-SELECTED THE SUPERCOMPUTER SITE

Agency officials visited Bay City and selected the building they wanted for the NESC. The same officials then manipulated the procurement process to have an EPA contractor lease that building for Agency use. These actions not only violated the intent of the Competition in Contracting Act (the Act), but also resulted in the Agency excluding from competition a second building whose use could possibly have been acquired at far less cost. These same officials also violated acquisition regulations when they provided acquisition information to the selected subcontractor five months before the procurement was advertised for competition and dealt directly with a real estate agent representing the pre-selected building's owner.

In addition, the "comparable" price quotes submitted by the contractor to the Contracting Officer to justify the rental price of the pre-selected building were questionable. Moreover, other price quotes that did not support the rental price of this building were omitted from the package the contractor submitted to the Contracting Officer, and were only obtained under an OIG subpoena. Finally, the pre-selection of the building resulted in acquisition of a facility twice as large as required.

RELEVANT LAWS, REGULATIONS, AND DECISIONS

The actions by the Office of Administration and Resources Management personnel associated with the pre-selection of the supercomputer site violated the principles of various laws, regulations, and decisions. (For actual citations, see Appendix I).

Competition

The Competition in Contracting Act (41 U.S.C. 253) pertains to executive agencies obtaining contractor services, rather than an agency's contractor obtaining subcontractor services. However, the

Comptroller General has found that the procedures followed by a contractor must conform to Federal policy objectives that underlie Federal statutes. One of the policy objectives of the Competition in Contracting Act stipulates that in conducting a procurement for property or services, an executive agency shall specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition. According to the legislative history of the Act:

> **Competition is not a procurement procedure, but an objective which a procedure is designed to attain. . . The last, and possibly the most important, benefit of competition is its inherent appeal of 'fair play.' Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism. . . . The Attorney**

> **General has interpreted congressional intent as 'preventing favoritism . . . and the notorious mischief of making contracts privately.'**

According to the Comptroller General, it is a fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity. The dual purpose of requiring agencies to obtain full and open competition is to ensure that a procurement is open to all responsible bidders and to provide the Government with the opportunity to receive fair and reasonable prices (Decision B-265869, January 2, 1996).

Moreover, court decisions have maintained that:

> **Proof of subjective bad faith by procuring officials, depriving bidder of fair and honest consideration of its proposal, generally constitutes arbitrary and capricious action; bad faith includes predetermining the awardee or harboring prejudice against plaintiff. Latecoere Intern., Inc. v. U.S. Dept. of Navy, 19 F.3d 1342 (11th Cir. 1994)**
>
> **Law of procurement does not tolerate actions reflecting personal predilections of administrative officials, whether ascribable to whim, misplaced zeal, or impermissible influence. Parcel 49C Ltd. Partnership v. U.S., 31 F.3d 1147 (Fed. Cir. 1994)**

Contacting Potential Offerors

The Federal Acquisition Regulation (FAR 15.402) (1990) stipulates that contracting officers shall furnish identical information concerning a proposed acquisition to all prospective contractors. Government personnel shall not provide the advantage of advance knowledge concerning a future solicitation to any prospective contractor.

BACKGROUND

Congress funded $8.7 million for an EPA supercomputer to be located in the Bay City, Michigan vicinity. The acquisition planning for this computer was carried out by OARM's National Data Processing Division (NDPD). In order to lease a building to house the supercomputer, OARM, NDPD, with the assistance of the Office of Acquisition Management (OAM), utilized the services of an EPA contractor under contract to operate Agency computer facilities--not obtain real estate.

The purpose of this chapter is to depict how EPA violated laws and regulations by: (a) selecting the site it wanted for the NESC facility; (b) providing details regarding requirements to the site-owner's agent in advance of the formal solicitation; and (c) directing the contractor to tailor the solicitation to fit the characteristics of that site.

LEASE CHRONOLOGY

I - Bay City Vicinity Site Options

On December 20-21, 1990, the then Director, Office of Administration and Resources Management, Research

Triangle Park, NC (OARM-RTP), accompanied by the then Director of the Office of Information Resources Management and the then Director of NDPD, toured two potential sites within the Bay City vicinity.

The first site, the Kahn building, was a two-story, 21,000 square foot building located within Bay City that:

- **Had been constructed in 1910.**

- **Was unoccupied since 1986.**
- **Did not meet current local building codes.**

The owner of the Kahn building was represented by a real estate agent, who also had a relationship with a developer interested in purchasing the building.

The second site was a single story building located just outside of the city limits of Bay City. In the words of the OARM-RTP Director, it was:

> **[A] 24,000 square feet state-of-the-art computer center. It would be the envy of every computer center director or facility manager who saw it. The S&L who owns it never moved in and is presently using it for storage of equipment and fixtures.**

The owner of the second site informed the Director, OARM-RTP that the property could be purchased for substantially less than the current $2.5 million asking price, or even leased if EPA so wished.

II - Rationale For Site Selection

In a January 7, 1991 memorandum, the Director, OARM-RTP recommended having the EPA contractor lease the Kahn building or something in the area for the supercomputer. Specifically, he explained that the other building, the computer center, was ideal except for:

> **It was too large for our needs (roughly 5,000 square feet at this time). . . .**
> **The second problem is that it is not downtown. Since the Lake Guardian [the "Lake Guardian" was a former oil rig supply vessel that had been converted into an EPA research ship docked along the Saginaw River] will be moored in the downtown area it makes no sense to fragment our presence, even on a 2-5 year basis. Having been through that, first in Cincinnati and now in RTP it is worth a lot to be physically collocated together.**

Thus, the Director concluded that the Agency should task the contractor:

> **[T]o obtain a 2-5 year lease on the Kahn building or something in the area for the Supercomputer.**

III - Exclusion of Competition

The decision to lease the Kahn building was made almost two months before the requirement was formally advertised for competitive bid. We were informed by the Director, NDPD and by the EPA Project Officer, that the contractor stated that initially both the owners of both the Kahn building and the computer center had made offers. However, according to the Director, NDPD, the requirements were subsequently changed by EPA officials, i.e., to have the contractor limit the area of consideration to the <u>city</u> of Bay City rather than the <u>vicinity</u> of Bay City as stated in Public Law 101-507. Therefore, the computer center was effectively excluded from the competition.

However, there was no justification for the restriction. First, the computer facility that was excluded from competing for the award <u>was</u> located in the Bay City vicinity as promulgated in the Public Law. Second, there was absolutely no need to link the supercomputer to the "Lake Guardian;" the Director of the NESC stated that the data collected by the ship could be analyzed on a personal computer.

EPA officials violated the intent of the Competition in Contracting Act when they unreasonably manipulated restrictive provisions to exclude a viable competitor.

IV - Inappropriate Contacts

Throughout the period leading up to the formal advertisement for bids in late May 1991, EPA personnel had made inappropriate contacts with the real estate agent representing the owner of the Kahn building.

The following information was obtained from various documents we reviewed and interviews we conducted during the audit.

December 1990

During their visit to Bay City, the OARM officials provided EPA requirements and requested engineering data as to the strength of the floor and the electrical grid capabilities for the building. This data was submitted by the agent in January 1991, along with a cover letter stating, "Should we receive a tentative commitment from EPA, we will proceed with the 'coring' to more accurately assess the 'live load' capacity."

The floor strength and the electrical grid capabilities were key evaluation criteria in that they were eventually included in the project requirements of the bid solicitation and the source selection plan. The "coring" operation commenced in March 1991. By providing these project requirements to the owner's agent, EPA officials violated the FAR requirement to treat all prospective offerors equally.

January 1991

The Director, OARM-RTP recommended having the EPA contractor lease the Kahn building or something in the area for the supercomputer.

March 1991

In response to a request from the EPA contractor, the real estate agent submitted a cost estimate for a 5,000 square foot facility, noting that the Kahn building's floors were strong enough for the supercomputer. The agent also sent the Director, OARM-RTP a letter from a structural engineer concerning the building's floor strength.

April 1991

A meeting was held to plan the acquisition of the Kahn building, among other subjects. In attendance were the Assistant Administrator, OARM, the Deputy Assistant Administrator, OARM, and the Director, OARM-RTP. As a result of the meeting, the Director, OARM-RTP notified the Director, NDPD that pending Contracting Officer approval, it had been decided to lease the entire Kahn building for five years, with an additional five one-year options. There was concern over how much it would cost to renovate the entire building and how to spread the renovation costs over the lease. (Note: These EPA officials violated the intent of the Competition in Contracting Act by planning to select the Kahn building prior to advertising for competition.)

The Director, NDPD notified the EPA contractor of the decision to lease the Kahn building and commented, "I assume we can be flexible with the length of lease right up to signing. I need to see our plan for negotiating and getting an approved design by some time next week."

The Director, NDPD and the Director, NESC agreed to budget $300,000 for partial renovations to the second floor and telecommunication equipment of the Kahn building.

The real estate agent informed the building owner that, "I expect any day now to be in receipt of 'Program' specifications and parameters that the building will have to meet. I don't expect any surprises."

The contractor submitted draft project requirements to the Project Officer that included a 14,000 square foot leased facility located:

> **[I]n the downtown Bay City area. Locations within two miles of the existing dock for the Lake Guardian vessel and the proposed site of the permanent EPA-owned facility will be given preference.**

The agent informed the owner that the Kahn building was the desired location for the EPA facility and that:

> **While there may be competition from the market place, our friendly Congressman would like to see this property as the location. Enclosed is an EPA "Status Report" for your review.**
> **Within 2 weeks we will have to make some quick decisions on whether to sell the office building (presumably to the developer) or develop it and lease it to EPA.**

The EPA Project Officer informed the Contracting Officer that: (a) the project will require a 14,000 square foot leased facility located within the city limits of Bay City, Michigan; and (b) there would be only one firm selected for negotiations. The Contracting Officer approved the project plan.

May 1991

After approving the plan, the Contracting Officer expressed concern over selecting only one firm for final negotiations. The Project Officer responded to this concern by asserting that negotiating with two firms would be cost and time prohibitive.

The developer agreed to purchase the Kahn building, subject to signing a lease with EPA or the Agency's contractor.

On May 10, the real estate agent sent the owner and the developer a copy of the project's requirements, and mentioned to the owner that bids would be solicited in the local newspaper at the end of the month.

During an interview with a local newspaper, an OARM official explained that the Agency had already ruled out the existing computer center as a possible site for the supercomputer facility because it was located too far from the city.

On May 28-30, the EPA contractor advertised requirements for 14,000 square feet of space to be located within the city limits of Bay City, Michigan. The bids were due by June 28.

June 1991

A NDPD "task schedule," dated June 3, listed the developer as a participant in the renovation of the NESC.

On June 25, the developer submitted a bid package for the lease of the Kahn building at $24.50 a square foot per year. This was the only offer submitted.

V - "Comparable" Rates

On October 31, 1991, the EPA contractor executed a lease with the developer. On November 1, the developer purchased the Kahn building. On December 2, 1991, the Contracting Officer consented to the subcontract (lease) between the contractor and the developer. Before consenting; however, the Contracting Officer suggested that the contractor obtain comparable market lease rates for general office space in other buildings in order to justify the lease rate proposed for general office space in the Kahn building. In response, the contractor obtained five such rates from the real estate agent. However, the contractor only submitted the three highest rates to the Contracting Officer. Both we, and the

Contracting Officer, only learned of the existence of the other two rates because of an OIG subpoena served on the real estate agent in 1995.

GENERAL OFFICE RATES

BUILDING	COST PER SQUARE FOOT PER YEAR
Midland #1	**$17.48**
Midland #2	**17.00**
Saginaw #1	**14.30**
Saginaw #2	**13.00**
Saginaw #3	**12.25**

None of the five buildings were comparable. They were located in Midland and Saginaw--not Bay City. In fact, they were all located farther away from Bay City than the computer center, which had been eliminated from consideration by EPA because of its distance from Bay City. All five buildings were Class "A" office structures located in two of the best commercial areas in Midland and Saginaw (according to a GSA appraiser, Class "A" buildings must be constructed after 1988 and be located in good commercial areas). According to a real estate appraisal, the Kahn building was a Class "C" structure; there were no Class "A" office buildings in Bay City.

None of the five rates were comparable to the rates for office space in Bay City. As seen in the "General Office Rates" chart on the previous page, the rates for the better commercial areas in Midland and Saginaw ranged from $12.25 to $17.48 per square foot.

However, the rate for general office space in the Kahn building had been considered far less by the developer who eventually purchased the building. In a letter dated September 21, 1990, the developer asserted to the owner of the Kahn building, that the market price for general office space in the Bay City area ranged from only $4.50 to $7.00 per square foot:

> **We recognize that the remodeling costs are only relative to the total cost and together with our purchase price represent a very attractive per square foot price. . . . The market price in the area is from $4.50 to $7.00 per square foot, relatively low. But its (sic) a matter of supply and demand. At this time Bay City has more supply of existing office space than demand, as evidenced by how long this property has been available.**
>
> **In discussions with our perspective (sic) client, they have indicated that they can pay approximately $7.00 to $7.50 per square foot absolute net. Using their required layout, we have enclosed an estimate of remodeling costs of $616,000 and based on the rent that can be generated plus remodeling costs, we have $275,000 available for purchase of the property. We believe that $7.30 per square foot, like you, is very reasonable, however its (sic) at the top of the scale in this area.**

VI - Building Space Exceeded Requirements

Pre-selection of the building resulted in acquisition of a facility twice as large as required. According to GSA regulations in effect at the time, as well as EPA guidelines that have gone into effect since, the Agency should have first developed its space requirements, and then gone through GSA to fill them. Instead, the Agency circumvented GSA, picked out the building it wanted, and then defined and redefined its space requirements. This is demonstrated in the following chronology and table:

- **December 1990 - The Director of OARM-RTP began the search for a building.**
- **March 1991 - The Project Officer increased the requirements to include an Information Center.**
- **April 1991 - Technical Specifications were drawn up by the EPA contractor.**
- **September 1991 - Final requirements were designed by a subcontractor hired by EPA's contractor. The subcontractor's report stated:**

> **Currently, it is the intention of the contractor and EPA to operate a fully functioning Super Computer which will act as a public awareness center, educating the public about the role of the EPA in today's environmentally conscious society. This site was specifically chosen for that purpose and it is the intention of the contractor and EPA to create an operational showpiece.**

SQUARE FOOTAGE ESTIMATES

	12/90	3/91	4/91	9/91 1
Supercomputer	**5,000**	**5,000**	**9,000**	**9,218**
Information-Ctr	**-**	**6,000**	**5,000**	**5,033**
Visitor Center	**-**	**-**	**-**	**1,250**
Building Stair & Elevator	**-**	**-**	**-**	**3,333**
Total	**5,000**	**11,000**	**14,000**	**18,834**

1. These amounts are expressed in functional gross square feet (FGSF). FGSF is defined as total building area (20,592 for the Kahn building) less outside walls.

Supercomputer. The Agency used 9,218 square feet of space for the supercomputer, operations staff, telecommunications and other support requirements. While we believe the change in the usage for the supercomputer is a result of EPA's desire for an operational showpiece, we do not question the need for this square footage.

Information Center. The final design included space for a visualization lab and technical staff, classrooms, and a break room. The visualization lab and technical staff are not required for supercomputer operations. We have been informed by operators of other supercomputers that these functions can be remotely located. EPA had already established these functions at RTP. Therefore there was no need to duplicate them in Bay City. The classroom and break room are not necessary for supercomputer operations and are used for an EPA public outreach program.

Visitors Center. The visitor center is neither related to the operation of a supercomputer nor the Regional Acid Deposition Monitoring program. This area was included to fulfill EPA's desire to have a public awareness center and an operational showpiece.

Building Stair and Elevator. The building stair and elevator were an attribute of the building and not a requirement for the supercomputer. If a one-story building had been selected, stairs and the elevator would not be needed.

CONCLUSION

Almost every action connected to obtaining the building to house the NESC was questionable. Lacking any procurement authority whatsoever, EPA program officials: (a) pre-selected the building they wanted for the supercomputer site; (b) disclosed information to the site owner; and (c) unreasonably restricted the area of consideration to exclude the only known competitor. Moreover, these events all occurred months before the solicitation for "competition" was even advertised. Also, the provenance of "comparable" price quotes used to justify the rates paid to rent the pre-selected building was dubious. As a result, EPA acquired a facility that was twice as large as the Agency required.

RECOMMENDATIONS

We recommend the Deputy Administrator:

3-1) Review whether any employee conduct violations occurred and whether disciplinary action is warranted under EPA Employee Responsibility and Conduct regulations and related policies and procedures against EPA officials who violated the intent of the Competition in Contracting Act and related Federal policy objectives and regulations.

We recommend the Acting Assistant Administrator for Administration and Resources Management:

3-2) Require that contract and project officer training courses emphasize the Competition in Contracting Act and related Federal policy objectives and regulations in order to ensure full and open competition is obtained, or its absence is properly justified.

3-3) Require that contract and project officer training courses emphasize that acquisition information should not be released inappropriately.

3-4) Conduct special training courses in Fiscal Year 1997 that concentrate on the areas discussed in recommendations 3-3 and 3-4 and which must be attended by all contracting and project officers.

3-5) Issue a memorandum to senior management to reemphasize that all space requirements on future projects must be coordinated through the Facilities Management and Services Division.

3-6) Require OARM staff to comply with GSA regulations and EPA guidelines in regard to defining space requirements on future projects.

AGENCY COMMENTS AND OIG EVALUATION

The response by OARM disputed many of the issues in this chapter and generally agreed with our recommendations. We analyzed OARM's response, and we did not materially change our position. The response in its entirety is contained in Appendix III.

OARM maintained that the Conference Report contained contradictory instructions about where the supercomputer was to be located. According to OARM, one section of the report indicated that it should be in Bay City, while another section specified that it should be in the Bay City vicinity. Because of this inconsistency, EPA officials sought and received guidance from members of the Appropriations Committee and consistently tried to give meaning to the inconsistent Congressional direction. It was the understanding of EPA officials that the new facility was to be located in Bay City.

We disagree with the notion that Congress mandated that the facility had to be located in Bay City rather than in the vicinity of Bay City. While the Conference Report admittedly contained both terms, it concluded with a statement that the supercomputer would be located in the vicinity of Bay City. More importantly, the Law that funded the supercomputer specifically stated that it would be located in the vicinity of Bay City. Furthermore, an EPA employee, who had helped draft the language that eventually became law, informed us that they had used the term vicinity in order to give the Agency the most flexibility possible for determining a location. In addition, OARM employees, who assembled the solicitation for the Center for Ecology Research and Training (CERT) facility project, were told by OGC to use the term vicinity.

OARM maintained that there were also sound business reasons for locating the facility in Bay City, i.e., to be near the "Lake Guardian" and the likely site of the CERT facility. In our draft report, we explained that there was absolutely no need to link the supercomputer to the "Lake Guardian." And, because the NESC facility was only to be temporary, there was also no need for it to be located near "the likely site" of the CERT. Moreover, documents we reviewed indicate that this "likely" CERT site was also being pre-selected by EPA. Although EPA advertised for a site in October 1991, it had already planned which specific site it was interested in two months earlier. The August 1991 CERT project plan stated:

Currently, the 35-50 acre parcel is bounded . . . on the south side by an asphalt plant. The asphalt plant especially creates a great deal of noise and pollution that would need to be heavily screened. In addition, the exhaust fumes from the asphalt plant may affect any future laboratory facility. By acquiring the entire 78 acres, the EPA avoids any concerns over its immediate neighbors because the site extends to the Saginaw River on the west side and to an existing roadway scheduled for a major reconstruction on the east. Purchasing the entire 78 acres would ensure EPA that its neighbors are of no concern. . . .

OARM admitted that in implementing Congressional direction, EPA officials made some mistakes. For example, OARM believed that EPA officials played an inappropriately intrusive role in the contractor's lease of the NESC site. At a minimum, the EPA officials' conduct created the impression that the site had been "pre-selected" by the Agency. Moreover, the course of dealing appeared to have been inconsistent with contracting principles and Agency policy concerning EPA involvement with subcontractors. In addition, OARM recognized that records were not properly created and maintained, as a significant amount of contract related "business" was conducted orally or via electronic mail.

OARM Response to Recommendation 3-1

OARM disagreed that there have been any violation of the Competition in Contracting Act.

OIG Evaluation

Although OARM agreed that every effort should be made to encourage competition, it took the position that the Competition in Contracting Act is not relevant to subcontract awards. We agree that strictly speaking the Act is not applicable to subcontract awards. That is why we stated that EPA officials violated the *intent* of the Competition in Contracting Act when they unreasonably manipulated restrictive provisions to exclude a viable competitor. Moreover, we also agree with OARM's position that FAR clause 52.244-5, Competition in Subcontracting, does not extend the Act's requirements to subcontracts--which is precisely why we did not make this statement.

However, the Comptroller General had found that subcontract competition is judged using the "Federal norm." OARM project officials toured Bay City and identified only one potential site. Comptroller General decisions have held that, under the "Federal norm," a procurement becomes competitive only when more than one source that can meet the Government's needs are known. The fact that only one

source was identified should have alerted OARM's contracting officials that the procurement was sole source. Furthermore, these officials should have known that an advertisement that elicited only one bid did not change the procurement from sole source to competitive. The fact that the procurement was sole source should have triggered an evaluation of whether the award was subject to the Truth in Negotiation provisions of the Competition in Contracting Act and whether a cost analysis was warranted.

OARM Response to Draft Report Recommendation 3-2

OARM disagreed that there have been any violation of the Procurement Integrity Act, because the Act does not apply to subcontracts placed after prime contract award. OARM did agree to look into possible violations of the standards of ethical conduct and the contracting principles embodied in Agency policy.

OIG Evaluation

We accept OARM's explanation at this time and have dropped the recommendation from the final report.

OARM Response to Recommendation 3-2 (Draft Report 3-3)

OARM believed that it had already met the intent of the recommendation. OAM had begun using standard, Federally-endorsed (Federal Acquisition Institute) training courses for contracting personnel, which heavily stressed the Competition in Contracting Act and related competition issues. OAM also revised one project officer course and was in the process of revising another. Both courses emphasized competition and related issues. In addition, OAM had new Contract Management Manual guidance, currently undergoing final Green Border review, on the roles and responsibilities of project officers in subcontract administration.

OIG Evaluation

We agree that the referenced courses do meet the intent of the recommendation in regard to procurement integrity and related ethics issues. No further action is required.

OARM Response to Recommendation 3-3 (Draft Report 3-4)

OARM believed the intent of this recommendation had already been met. A review of the contracting and project officer courses indicated that procurement integrity and related ethics issues were addressed.

In addition, and in accordance with the Office of Government Ethics (OGE), all contracting personnel and project officers are required to file standard form OGE 450, Confidential Financial Report, to determine possible conflicts of interest. Employees who file OGE 450 are also required to take an annual ethics course, much of which is dedicated to procurement integrity issues.

OIG Evaluation

We agree that the referenced courses do meet the intent of the recommendation in regard to procurement integrity and related ethics issues. No further action is required.

OARM Response to Recommendation 3-4 (Draft Report 3-5)

OARM did not believe that such training was necessary in light of the emphasis of the Competition in Contracting Act in its training courses and the Procurement Integrity Act in the annual ethics training requirement.

OIG Evaluation

We agree that the referenced courses do meet the intent of the recommendation in regard to procurement integrity and related ethics issues. No further action is required.

OARM Response to Recommendation 3-5 (Draft Report 3-6)

OARM planned to issue a reminder of the requirement to Senior Resource Officials and their staffs.

OIG Evaluation

The alternative action proposed by OARM should achieve the intent of the recommendation. We have revised our recommendation to reflect the proposed corrective action. No further action is required.

OARM Response to Recommendation 3-6 (Draft Report 3-7)

GSA regulations and EPA guidelines will be included in the memorandum noted in recommendation 3-6, and will be issued to OARM staff.

OIG Evaluation

The action planned by OARM should achieve the intent of

the recommendation. No further action is required.

CHAPTER 4
EPA EXCEEDED ITS AUTHORITY

EPA officials exceeded their authority and consequently violated the Antideficiency Act and the Competition in Contracting Act. The Antideficiency Act violation amounted to $3.7 million. The addition of the NESC project to an existing contract violated the Competition in Contracting Act. Also, by approving permanent improvements to the NESC building they allowed a "giveaway" of Government property. Finally, these officials directed the contractor to: (a) organize a grand opening ceremony for the NESC, the costs of which were unallowable; and (b) perform other work under the contract without first getting the Contracting Officer's approval. These situations occurred because the officials believed that it was within their authority to allow them to occur. In our opinion, they were mistaken.

I - Antideficiency Act

EPA violated 31 United States Code (U.S.C.) 1341(a) (the Antideficiency Act) by ordering a lease that ran longer than the available appropriation. The Antideficiency Act prohibits Government employees from involving the Government in a contract before funds are appropriated. The NESC building lease did precisely that by purporting to obligate the Government to reimburse its contractor $3.7 million over four-and-one-half years before the funds for those years were appropriated. The multi-year lease was conceived by OARM managers in order to spread the cost to renovate the NESC building over five years.

Although OAM contract officials raised serious objections, nevertheless, they ultimately acquiesced with the plan.

The multi-year lease plan was decided during an April 5, 1991, meeting of OARM managers. The participants included the Assistant Administrator, OARM, the Deputy Assistant Administrator, OARM, the Director, OARM-RTP, and the Deputy Director, the Office of Administration. On April 26, 1991, the Project Officer issued a project requirement document, under the Project Work Authorizations (PWA), which directed the contractor to negotiate a lease that lasted longer than the appropriation. Specifically, the requirements called for a five year lease with five one-year renewable options, while EPA's appropriation was due to expire in 17 months.

On October 31, 1991, EPA's contractor signed the five-year lease with the developer. Then on November 1, 1991, EPA's contractor purchased the NESC building. Initially, OAM balked at the idea of a five-year lease, because EPA did not have a five-year appropriation or a five-year contract. As a result, the OAM contracting officials warned that: (a) the period of performance for any subcontract could not be longer than the option in which it is issued; and (b) the contractor would be liable for costs beyond the first year of the lease. Despite these arguments; however, on December 2, 1991, the Contracting Officer did consent to the lease. Although she added a notation to the lease consent that the Government would not be held liable for the lease beyond September 30, 1992, this caveat was inexplicably not incorporated into any contract modification.

On March 30, 1992, an OAM Branch Chief informed the Project Officer that the five-year lease was approved, but warned that this was not to occur again. Specifically, the Branch Chief told the Project Officer that:

We thought through the multi-year leasing issue and agreed that contracts would go along with it on this action since these multi-year leases have some precedent under the [name deleted] contract and also the CO [Contracting Officer] had approved the use of a multi-year lease in a work plan. We also agreed that we would not authorize their use

again. . . . The transfer of the existing leases to the winner of the FM [Facilities Management] contract will be the end of this type of arrangement.

All leases done under our contracts will be single year only, with options to extend built into the Prime contract!!!!!! We will not approve a work plan or subcontracting agreement that has multi-year leases in them.

I hope the multi-year leases in the existing contracts don't create expensive problems for us. But if they do, it only illustrates why we should not get into them in the first place.

Despite obtaining OAM's agreement to the five-year lease, the Project Officer was not satisfied. In his March 31, 1992 reply, he informed the OAM Branch Chief that:

I believe this is very short sighted on our part! It is just not the way most folks in the private sector work. The price tag the Bay City landlord would want as a buyout at the end of one year would be astronomical and I doubt that any of us would have been willing to have approved it. It would be one more item for endless negotiation. Most of the office landlords around here would probably not even entertain such an option. If you are not willing to sign a multi-year deal, they will just lease to someone else. Ultimately, this will cost the taxpayers more money because the landlord will negotiate higher lease rates just to play our game.

We have used assignable leases for years. Why has this suddenly become a problem?

Both the OAM Branch Chief and the Project Officer were in error. The Antideficiency Act prohibits Government employees from involving the Government in a contract before money is appropriated to pay for that contract. The five-year lease of the NESC building involved the Government four-and-one-half years beyond the life of the appropriation that funded the contract. As no funds had been appropriated for those years, the amount of the violation was $3,706,560 (monthly rent of $68,640 multiplied by the 54 months remaining on the lease). The intent of the Antideficiency Act is to prevent executive branch employees from incurring obligations not authorized by Congress, which has the sole authority for appropriating funds. EPA officials violated the Act by agreeing to the five-year lease. The Act requires that such violations be reported to Congress, and provides that the violators can be punished by suspension without pay, removal, fines, or imprisonment.

II - Competition in Contracting Act

The addition of the NESC project to an existing contract violated the Competition in Contracting Act. This Act does not allow for the addition of work that was not within the scope of the competition of the original contract award. Instead, such additional work should be competitively procured as a new contract.

The scope of the contract EPA used to renovate and lease the NESC building was actually for computer operations and related services at specific locations. There was no mention of "Bay City," "supercomputers," "NESC," or "building renovations."

The Comptroller General provided factors for determining if a modification is material and therefore improper. These factors include the type of work, the performance period, whether the solicitation for the original contract adequately advised offerors of the potential for the types of change contemplated, whether the change is of a nature that potential offerors would have reasonably anticipated, and whether the work was envisioned at the time the contract was originally awarded (Decision Numbers 69 Comp. Gen. 292 and B-188408, June 19, 1978 - see Appendix I).

Admittedly the NESC project was not planned at the time the contract was awarded. However, the evidence shows the change was material. Most importantly, the work was different. Rather than use existing employees, the contractor hired new consultants to help establish the NESC and new employees to operate the supercomputer. In addition, the performance period of the lease was longer than the contract, and the contract period had to be extended to complete the renovations. Potential offerors could not have anticipated the change because the contract does not mention the project. Although OAM officials claimed to have written a "Justification for Other than Full and Open Competition," they were unable to provide us a copy. In our opinion, other contractors chosen under a competitive basis could have done the same job--at a lesser cost.

III - "Giveaway" of Government Property

The EPA allowed a "giveaway" of Government property by approving permanent improvements to the NESC building as part of the lease costs charged to the contract. According to Comptroller General decisions (see Appendix I), it is a well-established rule that appropriated funds may not ordinarily be used for the permanent improvement of private property unless specifically authorized by law. This rule is based on the fact that no Government official, in the absence of specific legislation, is authorized to "give away" Government property. In the past, this rule has been upheld to the extent that even an "urgently needed" emergency landing field at a privately-owned airport was denied because there was no legislation to allow the permanent improvement. There was also no such specific legislation regarding the NESC building. Furthermore, we were unable to calculate the value of property "given away," because the Contracting Officer failed to obtain any cost and pricing data supporting the proposed lease rate. (See Chapter 5 of this report.)

The building selected to house the NESC required significant renovation in order to meet current building codes, as well as the additional improvements necessary to accommodate the supercomputer. The permanent improvements to the building paid for by EPA included new windows, floors, a roof, an elevator, walls, carpets, a heating system, electrical wiring, and the removal of asbestos. As explained in Chapter 2 of this report, the developer purchased the building one day after EPA's contractor signed the lease. Also, the developer recouped the initial investment early on into the lease, a factor that contributed heavily to the $3.8 million in excess lease costs. Furthermore, although the lease was for only five years, the improvements "given" to the developer will last longer.

ESTIMATED LIFE OF "GIVEAWAYS"

ESTIMATED LIFE	IMPROVEMENTS
7 Years	Carpet Computer Floor Plumbing HVAC Temperature Controls Electrical
15 Years	Sewers Site Drainage Parking Lot Site Lighting
31.5 Years	Building Roof Doors Elevator

The EPA Contracts Management Manual addresses permanent improvements. The Project Officer was aware of the manual as he requested a copy from contracting personnel in an April 1991 memorandum in which he stated:

If any improvements that will cost the Government money are necessary to [contractor's name deleted] acquired Non-Government Realty, all terms of Chapter 5 of the Contracts Management Manual will be complied with.

Chapter 5 of the Contracts Management Manual stipulates what is to occur prior to the award of a contract that envisions permanent improvements to private property at Government expense. Basically,

the Project Officer is to provide enough information to enable the Contracting Officer to approve or disapprove the proposed improvement. Such information includes:

- **A description and estimated cost of the improvement.**
- **The arrangement under which the improvement will be provided, i.e., lease payment.**
- **The proposed contract provisions to protect the interests of the Government. For example, such provisions would spell out how much money the Government would be reimbursed for the fair market value of the improvement at the end of the lease.**

In regards to the improvements to the NESC building, the Government will receive nothing because no EPA official took any action to protect the Government's interest.

IV - Grand Opening Ceremony

OARM officials exceeded their authority by directing the contractor to organize a grand opening ceremony for the NESC, and then charge the costs to the contract. The Contracting Officer exceeded her authority by accepting these costs as allowable. However, these costs were ineligible because such events are not recognized as appropriate by GAO's *Principles of Federal Appropriations Law* (page 4-215). We identified $23,540 charged for a consultant, tents, tables, and chairs. Evidence indicates additional costs were incurred for food, plaques, and catering staff. We requested documentation from EPA, the contractor, and the subcontractors; however, none was provided.

The NESC grand opening was held on October 16, 1992; planning for the event commenced several months earlier when the contractor hired a former EPA employee as a consultant. The ceremony itself included: a speech by the local Congressman, a speech by an EPA official, a ribbon cutting, and a barbecue lunch. Related events included presentation of plaques to dignitaries (including EPA employees), a Chamber of Commerce breakfast, and tours of the NESC building.

V - Unauthorized Work

EPA personnel exceeded their authority by directing the contractor to perform work without the Contracting Officer's prior approval. The Director, OARM-RTP, the Director, NDPD, and the Project Officer orally ordered $43,102 of work despite the fact that they had no contracting authority. These changes were never submitted to the Contracting Officer for approval, and hence were never formally incorporated into the contract. The $43,102 represented:

- **$38,051 for a building access cardreader, a closed circuit television, and a fire alarm system.**
- **$4,912 to change a conference room into a video conferencing room.**
- **$139 for clothing storage bins for visiting EPA employees.**

Initially, the Director, OARM-RTP and the Director, NDPD instructed an NDPD employee to obtain price estimates and issue Government purchase orders to obtain the cardreader, the closed circuit television, and the fire alarm system. However, the contractor complained that this was improper because the contractor could not maintain the appropriate relationship with its landlord if EPA arranged the work. The contractor also stated that it would not accept responsibility for work ordered by the Agency. Subsequently, the Project Officer sent the contractor an electronic mail message instructing "[Y]ou should consider these requirements as technical direction." In response, the contractor issued purchase orders to the developer (the building owner), who then issued subcontracts to the firms originally selected by the Agency, one of which informed the developer that EPA already had approved its bid.

In addition, the Project Officer ordered work to begin prior to the Contracting Officer giving approval by contract modification. He issued two PWAs for the establishment of the NESC, amounting to $2.2 million. Although the contractor began working, it was four and six months, respectively, until the Contracting Officer modified the contract to include the two PWAs.

In our opinion, these situations were caused by a misunderstanding over authority. For example, the Director, NDPD defended ordering changes to the conference room by asserting that he had the authority by nature of his position:

I viewed these modifications . . . as . . . technical direction . . . to insure that EPA received the most effective renovation of the building to best meet the Agency's needs. . . . It was my understanding . . . I was authorized to expend additional Government monies as part of my responsibilities in the technical direction realm . . . I did not feel it was necessary to obtain Contracting Officer approval to expend the additional funds. . . . It was my belief that . . . increased costs were acceptable as long as the additional costs were within the ceiling of the contract.

It would appear that the Project Officer shared the NDPD Director's belief. In commenting on the Project Officer's earlier direction of the contractor, the former Contracting Officer remarked:

I state without smiling that we people, whose signature spends the Government's funds, would like to retain the illusion that we understand and approve a contract change before the program manager directs the contractor to do new work.

According to FAR 43.102(a) (1991), only the Contracting Officer has the authority to modify a contract to add work; other Government personnel are to limit their technical direction to work that is already authorized in the contract. New work that could otherwise be properly added to the contract should not have been ordered by personnel providing "technical direction." Unauthorized work diverts funds provided for legitimate contract work, effectively "taking from Peter to pay Paul," and can cause a violation of the Antideficiency Act.

RECOMMENDATIONS

We recommend the Deputy Administrator:

4-1) Coordinate with EPA's Office of the Comptroller in order to fulfill the reporting requirements of 31 U.S. C. 1351 for a violation of 31 U.S.C. 1341(a). The Administrator must report all relevant facts and a statement of action taken to the President and Congress through the Director, Office of Management and Budget.

4-2) Review whether any employee conduct violations occurred and whether disciplinary action is warranted under EPA Employee Responsibility and Conduct regulations and related policies and procedures regarding violation of the Antideficiency Act or the Competition in Contracting Act.

We recommend the Acting Assistant Administrator for Administration and Resources Management:

4-3) Review all current subcontracts to identify any other violations of the Antideficiency Act.

4-4) Provide personnel with contract administration responsibilities training on the Antideficiency Act and appropriate limits for subcontract periods. This should be incorporated into the training discussed in recommendation 3-4.

4-5) Develop and implement policies and procedures to ensure EPA does not direct a contractor to subcontract beyond the available appropriation or the end of the contract.

4-6) Provide OARM officials with contract administration responsibilities training on the use of Government funds for permanent improvements to private property.

4-7) Reemphasize to project officers and managers the extent and limits of their contract administration responsibilities, stressing that they may not direct additional work without explicit authorization.

4-8) In each new EPA contract award, define the project officer's authority and responsibility.

AGENCY COMMENTS AND OIG EVALUATION

OARM Response to Recommendation 4-1

The response by OARM disputed the issues in this chapter and generally disagreed with our recommendations. We analyzed OARM's response, and we did not materially change our position. OARM's response in its entirety is contained in Appendix III.

OARM asserted that EPA did not violate the Antideficiency Act, since it was not a party to, or bound by, the lease for the Kahn Building. The subcontract between the subcontractor and EPA's contractor did not serve to legally obligate EPA. In consenting to the subcontract, the Contracting Officer specifically noted that the Government would not be held liable beyond the date of the expiration of the contract.

OIG Evaluation

We disagree with the OARM's position and continue to believe the subcontract creates an Antideficiency Act violation. Subcontract privity is not relevant to EPA's liability for five years of rent costs. Subsequent events confirmed the intentions that existed at the time the [the contractor] lease was executed. That is, the termination reference in the solicitation for the follow-on contract and the lease assumption clause in the follow-on contract reflected what EPA intended all along; that an EPA cost-reimbursement contractor would lease the space for at least five years, effectively obligating the Agency for lease payments throughout that entire period.

The contract that continued the NESC project included the lease and stipulated that, "[T]he Contractor shall assume the leases from the predecessor Contractor." Clause H.32, page 112, of this contract stipulated that, "The successor contractor shall be responsible for assuming the lease(s) . . . at the Bay City, Michigan site from the incumbent contractor." At the time the successor contract was awarded, over four years remained on the subcontract.

The solicitation for the successor contract advised prospective bidders that the awardee would have to assume liability for the lease. The solicitation also advised bidders to factor in $3.8 million in early termination costs should the contractor choose to relocate the supercomputer to another facility. This $3.8 million was the

estimated liability for lease payments after the existing contract ended. Thus, this provision had the practical effect of compelling prospective bidders to continue occupancy of the facility.

Finally, OARM actions demonstrated that it intended for the supercomputer to be housed in the facility for at least five years. OARM officials directed that the lease run for five years in order to spread out the costs for the renovations to the Kahn building. From the beginning of the NESC project, OARM intended that its contractors would fulfill the liability for the lease costs and then be reimbursed by the Government.

To summarize, insofar as the Agency had available appropriated funds for only a fraction of the five year lease period, EPA incurred an obligation in advance of an appropriation. Consequently, EPA violated the Antideficiency Act and must report this violation to Congress.

OARM Response to Recommendation 4-2

OARM's response stated that the OIG has not, at this time, made available for Agency review certain Office of Audit work product materials. The OIG has advised us (1) that our access to such materials would not advance resolution of any audit report findings, and (2) that the materials at issue are potentially only germane to a determination of whether, and to what extent, personnel actions might be appropriate.

It is our understanding that, after all audit report issues other than this one are resolved, the OIG will make available to us its work product materials relevant to the personnel issue. Once the OIG has released such information, OARM will review it and take appropriate personnel actions as warranted.

OIG Evaluation

The actions planned by OARM should meet the intent of the recommendation. We will provide access to the documents required after all audit report issues are resolved.

OARM Response to Recommendation 4-3

OARM disagreed that a review of EPA subcontracts to ensure compliance with the Antideficiency Act was necessary. These instruments do not legally obligate Federal funds because there is no privity of contract between subcontractors and the Agency.

In addition, all of the Agency's cost reimbursement clauses include FAR clauses 52.232-22 and 52.232-20, Limitation of Funds and Limitation of Costs, respectively which may provide further protection against Antideficiency Act violations. The language in these clauses makes it quite clear that the Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount obligated by the Government on the contract. This would include work done by a subcontractor, as well as that done by the prime contractor. The prime contractor is responsible for managing its subcontractors in this context. Also, as discussed, FAR Part 44 expressly states that giving consent to a subcontract in no way constitutes approval of any terms and conditions of the subcontract, because there is no privity between the Government and the subcontractor.

OIG Evaluation

We disagree with OARM's assertion that subcontracts never legally obligate Federal funds. As discussed in our evaluation of OARM's response to recommendation 4-1, Government actions can create a liability. The Limitation of Costs and Limitations of Funds clauses did not protect the Government in the cases and decisions cited in our evaluation of OARM's response to recommendation 4-1. Therefore, we reiterate our original recommendation.

OARM Response to Recommendation 4-4

OARM agreed that training regarding the Antideficiency Act would be beneficial. OAM will, in coordination with the Office of the Comptroller, take advantage of special training opportunities (such as the annual EPA procurement conference) to conduct training for contracting and project officers regarding the application of the Antideficiency Act to Agency contracts. This training will be accomplished in FY 1997.

OIG Evaluation

The actions planned by OARM and OAM should fulfill the intent of the recommendation. No further action is required.

OARM Response to Recommendation 4-5

The decision to subcontract and who to subcontract with, is a business decision made by a prime contractor. EPA cannot legally require a prime contractor to limit the term of a subcontract, since the subcontract may be in fulfillment of multiple requirements under several different contracts with several different agencies or firms. This recommendation conflicts with the well established legal principle that privity of contract limits an Agency's legal obligation to subcontractors.

OIG Evaluation

We agree that the decision to subcontract, and who to contract with, should be a business decision. That is precisely why we criticized OARM in Chapter 3 for directing the NESC subcontract, i.e., pre-selecting the Kahn building. However, we disagree that the Government is unable to restrict the length of a subcontract, because of the ramifications of the Antideficiency Act. Government employees are prohibited by the Act from involving the Government in a contract before money is appropriated to pay for the contract. Therefore, we reiterate our position that OARM needs to develop and implement policies and procedures to ensure no subcontracts run past the available appropriation or the end of the contract.

OARM Response to Recommendation 4-6

OARM will take advantage of special training opportunities to offer training regarding using Government funds for permanent improvements to private property. This training will be completed in FY 1997.

OIG Evaluation

The action planned by OARM should fulfill the intent of the recommendation. No further action is required.

OARM Response to Recommendation 4-7

With the award of each new contract, the project officer receives a letter reiterating his/her duties, responsibilities, and authorities. OARM will revise this document to specify the scope and limitations of authority of the project officer.

OIG Evaluation

The action planned by OARM should fulfill the intent of the recommendation. No further action is required.

OARM Response to Recommendation 4-8

OARM will look into revising the EPA Technical Direction clause to identify the scope and limitations of the project officer's authority. OARM will also consider providing copies of the letter referred to in recommendation 4-7 to Agency contractors.

OIG Evaluation

The response does not meet the intent of our recommendation. OARM project officials were inappropriately involved in the "giveaway" of Government property, the grand opening ceremony, and unauthorized work. Due to the significance of these actions, we can not close out this recommendation until OARM takes action or proposes an acceptable alternative to our recommendation.

OARM agrees that appropriated funds may not be used for permanent improvements to private property. However, OARM maintains, "[T]he appropriate time to definitively conduct such an analysis is at the end of the contract." We disagree. The appropriate time to analyze such expenditures is in advance of the expenditure. OARM offered a Comptroller General decision in support of its position. In fact; however, this decision did not support OARM's position. The decision does not state that contract completion is the appropriate time to analyze permanent improvement costs. Furthermore, EPA's Contracts Management Manual requires preaward analysis and approval of all permanent improvement costs.

The response also questioned the guidelines we employed for evaluating expenditures for permanent improvements to private property. OARM offered three other Comptroller General decisions as appropriate guidelines for such evaluations. One decision concerned GSA's authority to repair and alter leased premises. However, this decision is not relevant because, as seen in our report, OARM circumvented GSA. The other decisions offered by OARM were in fact derived from the Comptroller General decision we used, namely, the decision contained in OARM's Contract Management Manual.

OARM alleges our finding concerning improper use of funds for the grand opening ceremony was premature and should await final audit. We disagree. The Contracting Officer was informed of the scope of subcontracts and consented to them. This informed consent was sufficient to draw the conclusion that these expenditures were improper.

We also disagree with OARM's assertion that the determination of whether OARM personnel took unauthorized actions must wait for a closeout cost audit.

In summary, we believe that rather than "look into" or "consider," OARM should implement the recommendation, i.e., define the project officer's authority and responsibility in each new contract award.

CHAPTER 5
EPA'S SUBCONTRACT ADMINISTRATION VIOLATED LAW

EPA administration of the NESC subcontract violated law and the FAR. This violation exposed the Government to claims by the subcontractor for excess costs. It also complicated the recovery of Government property that had been "given away." The violation occurred because the Contracting Officer did not enforce the Truth in Negotiations provision of the Competition in Contracting Act during subcontract consent.

In addition, the Contracting Officer and the Project Officer did not ensure that $5 million of Government equipment that had been furnished to the contractor was recorded on property records. This equipment included the supercomputer. The omission reduced accountability thereby jeopardizing the equipment. After we brought the issue to the attention of the Project Officer, the equipment was added to the records.

RELEVANT LAWS AND REGULATIONS

Cost-plus-a-percentage-of-cost contracts are prohibited by the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254(b)). The Competition in Contracting Act requires advance procurement planning and market research to achieve full and open competition (41 U.S.C. 253a(a)(1)(B)). The Act requires written justification when full and open competition is not achieved, i.e., sole source award. The following decisions illustrate the criteria for judging if full and open competition has been achieved:

- The Comptroller General found a competitive procurement is not converted into a sole source procurement when only one bid is received if it can be demonstrated that firms other than the sole responsive bidder could have met the requirements (Decision Number B-221559.2, July 31, 1986).
- The GSA Board of Contract Appeals (GSBCA) found that a solicitation under which forty-nine firms were solicited, but only one responsive bid was received, was ill-conceived and resulted in less than the full and open competition required by the Competition in Contracting Act. The Board concluded the response was so limited as to excite inquiry, and a full explanation of the limited response disclosed that in fact full and open competition was not obtained (GSBCA Number 8329-P-R., April 10, 1986).

The Truth in Negotiations provision of the Competition in Contracting Act stipulates that before a subcontract is awarded the subcontractor must submit cost or pricing data. The subcontractor is also required to certify that this data is accurate, complete, and current (41 U.S.C. 254(d)). The legislative history for the Competition in Contracting Act states:

In Government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business.

[C]ompetition in contracting saves money . . . competition is a powerful motivator for cost control.

[This provision] addressed Congressional concern over noncompetitive contract prices being negotiated based on defective data submitted by contractors.

The contracting officer is responsible for determining price reasonableness for the prime contract. In order to make this determination, subcontractor cost or pricing data must be analyzed (FAR 15.806-1(a)(1)(1990)). The prime contractor is required to conduct a cost analysis of the data submitted by the subcontractor (FAR 15.806-1(a)(2)(1990)). Cost or pricing data is defined as facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. These facts include contractor historical accounting data, vendor quotes, and management decisions of the prospective contractor (FAR 15.801(1990)).

FAR 44.202-2 (1990) requires the Contracting Officer consider the following factors before consenting to a subcontract:

- Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?
- Was adequate price competition obtained or its absence properly justified?
- Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?
- Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?

I - Subcontract Type

The subcontract to lease the NESC building was signed on October 31, 1991. On the next day the developer purchased the building. On November 13, 1991, the contractor requested the Contracting Officer's consent to the subcontract. However, the subcontract document itself was not received at EPA until January 9, 1992, and then only at the behest of a Contracting Officer not affiliated with the contract. The Contracting Officer who

was affiliated with the contract informed us that she had never in fact read the subcontract. Had she read the subcontract, she would have noted that it contained a provision prohibited by law, i.e., a cost-plus-a-percentage-of-cost provision. The provision stipulated that the lease price would be adjusted by cost plus 82.5 percent for material modifications to the renovation specifications.

II - Subcontract Competition

As explained in Chapter 3 of this report, there was no subcontract competition because EPA pre-selected the site. Although the Contracting Officer informed us that she had been unaware of this lack of competition, the contractor's consent request did state that there had been only one bidder. The contractor asserted there had been competition because the requirement had been advertised in a Bay City area newspaper. However, an advertisement, by itself, does not fulfill the requirements for competition. The contractor should have conducted market research and planning to achieve full and open competition prior to the advertising. If this research identified only one bidder, the law required that efforts be made to enhance competition. If these efforts failed, then the contractor should have submitted a written justification for a noncompetitive award. In this instance no efforts were made and no justification was submitted. During an interview, the Contracting Officer admitted that when only one bid is received, the process should be questioned. However, she did not.

III - Truth in Negotiations

The Contracting Officer failed to enforce the Truth in Negotiations provision of the Competition in Contracting Act, as well as the related regulations requiring cost analysis. This law requires subcontractors to submit cost or pricing data and certify it is accurate, complete, and current. It also allows the Government to reduce subcontract prices that are inflated because of inaccurate, incomplete, or noncurrent data. Congress enacted this law to protect the Government's interest when market competition is not adequate to motivate a contractor to control costs. By not obtaining cost or pricing data, the Contracting Officer complicated the recovery of excess costs paid to the developer. This data also could have been used to monetize the Government property that had been "given away" as permanent improvements.

The consent package provided by the contractor did not include a cost analysis. The cost analysis would have provided the principal elements of the subcontract price proposed, and the difference between the price proposed and the price negotiated. Deeming the subcontract to have been competitively procured, the Contracting Officer did not request the cost analysis. She was unaware that there in fact had been no competition. The Contracting Officer informed us that she was also unaware that:

- The Law did not require the supercomputer to be located in the city of Bay City.
- The rates submitted by the contractor as "comparable" were not; they were for facilities in better commercial areas outside the Bay City vicinity.
- The "comparable" rates submitted by the contractor were not from an independent source, but rather from an agent of the developer.
- The building listed in the subcontract was 20,600 square feet; the space requirement advertised in the newspaper was only 14,000 square feet.
- The $39.95 per square foot rate that EPA was paying had been negotiated up from the subcontractor's initial price proposal of $24.50 per square foot.
- The Kahn building required extensive renovations.

The Contracting Officer informed us that had she been aware of the circumstances regarding the subcontract, she would have required the submission of certified cost and pricing data, and may not have consented to the subcontract.

IV - Determination of Responsibility

As explained in Chapter 3 of this report, the basis of selection was flawed. EPA program personnel selected the building they wanted and then manipulated the procurement process to have the contractor lease it. There was no evidence that the contractor or the Contracting Officer evaluated the developer's responsibility to contract pursuant to FAR 44.202-2(a)(7) and 9.106-1. Proper evaluation of the subcontractor's responsibility would have disclosed that the developer had no performance record and did not own the building at the time the subcontract was negotiated and awarded by the contractor.

V - Administration of Government Property

FAR 45.505(c)(1990) stipulates that official Government property records must identify all Government property. EPA relied on the contractor to maintain the official records. However, the contract stipulated the Government was to maintain the records. During a tour of the NESC, we noted property identification numbers on the supercomputer and its peripheral equipment. We attempted to trace the numbers to the contractor prepared Government property records. These records, however, omitted over $5 million of equipment including the supercomputer, peripheral equipment, and upgrades to the supercomputer. These omissions reduced accountability, thereby jeopardizing the equipment. After we brought the issue to the attention of the Project Officer, the equipment was added to the records.

RECOMMENDATIONS

We recommend the Acting Assistant Administrator for Administration and Resources Management:

5-1) Provide Contracting Officers with training on subcontract consent procedures.

5-2) Require Contracting Officers to read proposed subcontracts before granting consent.

5-3) Require that Agency personnel maintain official property records for NESC equipment furnished to the contractor in accordance with the contract.

5-4) Require Government personnel periodically verify Government property inventories prepared by the contractor. This can be done by spot checking the inventory the contractors are required to submit to the CO by October 31 of each year.

AGENCY COMMENTS AND OIG EVALUATION

OARM Response to Recommendation 5-1

The response by OARM disputed the issues in this chapter and generally disagreed with our recommendations. We analyzed OARM's response, and we did not materially change our position. OARM's response in its entirety is contained in Appendix III.

OAM is currently revising its subcontract consent procedures in the form of a new chapter to the Contracts Management Manual. This chapter will be issued for Agency Directives Review (Green Border) during the first quarter of FY 1997. As an interim measure, a draft Procurement Policy Notice was issued and commented on by the OIG and will also be issued during the first quarter of FY 1997.

OIG Evaluation

The actions planned by OARM will fulfill the intent of the recommendation. No further action is required.

OARM Response to Recommendation 5-2

The assumption that inadequate performance on the part of any one contracting officer is assignable to all employees is without support. Although we believe that all EPA contracting officers are aware of and consistently comply with the requirement that they read proposed subcontracts before granting consent, this will be part of the policy noted above.

OIG Evaluation

The action planned by OARM will fulfill the intent of the recommendation, and no further action is required. However, we take issue with several of OARM's statements.

We agree that one employee's inadequate performance is not assignable to all employees. However, we believe a simple reminder can both reinforce good work and help employees who may need it.

That said, many of the OARM employees that were involved in the establishment of the NESC were unable to identify problems requiring corrective action. For example, OARM alleged that we misinterpreted the FAR by concluding that the NESC subcontract was sole-source, because only one firm responded to the advertisement. Our position is that the NESC subcontract should have been treated as sole-source, because OARM employees believed only one source was acceptable. Similarly, OARM's contention that it was reasonable for the Contracting Officer to exempt the subcontract from the Truth In Negotiation Act evidences an even larger problem.

OARM Response to Recommendation 5-3

In accordance with the FAR, the official property records are maintained by the contractor. The accuracy of these records is audited, pursuant to an interagency agreement with the Defense Contract Management Command. To require Agency personnel to also maintain records would be duplicative.

OIG Evaluation

OARM's nonconcurrence is noted. Although allowing the contractor to maintain the records is a generally accepted method under the FAR, the Regulation also allows the Government to reserve this function for itself. Both the earlier contract, as well as the current contract, stipulated that the Government would maintain the records. Therefore, if EPA wishes to have the contractor maintain the official property records for NESC equipment, it should modify the contract. We recommend OARM provide us a copy of the contract modification when it is executed.

OARM Response to Recommendation 5-4

In accordance with the FAR and individual contracts, EPA contractors are required to inventory and submit an annual report of Government property in their possession. This report must be accurate as of September 30, and be submitted to the Contracting Officer by October 31 of each year.

OIG Evaluation

OARM's response does not address the recommendation. We have reworded the recommendation to make it more clear. We recommend that Government employees periodically verify Government property inventories.

CHAPTER 6
EPA FAILED TO MAINTAIN DOCUMENTATION

Agency officials failed to make and preserve documentation of significant decisions and activities. Such documentation was required by the Federal Records Act and the Records Disposal Act (44 U.S.C. 3101). The undocumented EPA decisions involved the circumvention of GSA, violation of the Competition in Contracting Act, violation of acquisition regulations, and improper direction of the contractor.

The absence of records impeded our audit of the establishment of the NESC. The lack of Agency records required the use of subpoenas to obtain the majority of the documents we used from contractors, subcontractors, and other organizations.

RELEVANT LAWS AND REGULATIONS

44 U.S.C. 3301 defines records to include all materials made or received in connection with the transaction of public business as evidence of decisions or other activities of the Government.

44 U.S.C. 3105 requires Agencies to establish safeguards to prevent the unlawful removal or destruction of records. It requires the safeguards include informing officials and employees of the penalties provided by law for the unlawful removal or destruction of records.

44 U.S.C. 3101 requires the head of each Federal agency to make and preserve records containing adequate and proper documentation of the essential transactions of the agency and to protect the legal and financial rights of the Government.

18 U.S.C. 641 provides criminal penalties for stealing any record of the United States.

18 U.S.C. 2071 stipulates criminal penalties for willful destruction of records or documents including fines, imprisonment, removal from office and disqualification from holding any office under the United States.

36 CFR 1222.38 (1990) requires Agencies to create and maintain records sufficient to: (a) make possible a proper scrutiny by duly authorized agencies of the Government; (b) protect the financial, legal, and other rights of the Government; (c) document significant decisions and commitments reached orally; and (d) document important meetings.

Examples of Documentation Failures

We were not provided sufficient records related to EPA decisions and activities, because Agency officials failed to make and preserve such records. This lack of documentation violated

44 U.S.C. 3101. Examples of activities and decisions that the Agency failed to document are identified in the following:

- EPA officials decided to circumvent GSA and use an Agency contractor to obtain the use of the Kahn building. Representatives of various Agency offices provided us conflicting accounts of how this

decision was made. However, we were unable to establish the veracity of any of the accounts, because none of the representatives were able to submit any documents to support their assertions.

- OARM officials decided to have the contractor lease the Kahn building. They instructed the contractor to develop a requirements plan to implement this decision in an April 6, 1991, electronic mail message. Also, on April 10, 1991, OARM budgeted $300,000 to renovate the second floor of the Kahn building. Both of these decisions took place almost two months before the requirement was formally advertised. We learned of this information from contractor records; EPA had not retained any of the documents related to these events.
- EPA officials restricted the area of consideration for the NESC to the city limits of Bay City, Michigan, and provided conflicting accounts regarding this restriction. We were told by one official that the House Appropriations Committee set the location. Other officials told us that the Public Law required the facility to be located within the city limits of Bay City. Actually, the Public Law stipulated the location as the Bay City, Michigan vicinity. As such, a congressional committee would not be able to override the law. None of these EPA officials were able to document their assertions.
- The Director, OARM-RTP received correspondence from the agent that represented the owner of the Kahn building. This correspondence addressed the building's floor strength and EPA's requirements, months before these requirements were advertised. Although this correspondence was received in connection with public business, we were only able to obtain it by subpoenaing the agent's records. EPA did not retain any of the documentation.
- The addition of the NESC project to the existing contract violated the Competition in Contracting Act. Such additional work should have been competitively procured as a new contract. Although OAM officials claimed to have written a "Justification for Other than Full and Open Competition," they were unable to provide us a copy.
- The Deputy Assistant Administrator, OARM asserted that he gave biweekly briefings, on the status of the NESC project, to the House Appropriations Committee. However, he was unable to provide any documents in regard to these briefings.
- The local Congressman requested that the NESC visitor center auditorium seating capacity be enlarged from 15 to 44 persons, the capacity of a school bus. No documentation of the decision or its basis was maintained.
- The Director, NDPD orally directed the contractor to change a conference room into a video conferencing room without the knowledge of the Contracting Officer. This decision should have been documented to protect the financial rights of the Government.

An EPA Contracts Specialist made the following comments:

Some things were not documented. [The Contracting Officer] directed things not to be documented. In some cases, it disappeared. Some key decisions were not documented. It depends on the CO to document or not.

I am not surprised there is no documentation. He [the Project Officer] would tell me not to E-Mail him but to call. Everything was verbal, with no paper trail.

An OAM financial monitoring review in 1992 identified problems with the Project Officer's documentation practices. Although the Project Officer made a commitment to improve, we found that he failed to maintain contract files, internal correspondence, contractor correspondence, or payment files. EPA's "Contract Administration: A Guide for Project Officers" explains that:

The need to maintain proper records, logs, and reports cannot be emphasized enough. The Project Officer's records are considered part of the official contract documentation. . . . The Project Officer should immediately, upon his or her designation, set up a contract administration and suspense file for the contract. All documents, including internal memos, concerning the contract must be contained in the Project Officer's official files.

Agency personnel provided us the following statements concerning the preservation, maintenance, and safeguarding of Project Officer records. Initially they told us that technical direction was verbal. Next they told us that these files were expendable, i.e., they did not have to be maintained after the contract ended. However, upon learning that such records must be retained this argument was withdrawn. Then they told us, "Right, wrong, or indifferent, we have no further documentation on the . . . contract." Next they told us that the Project Officer files had been boxed up and sent to the contracting office. However, there was no record of shipment, the files were never received, nor were they expected. Finally, they told us that most of the files had been destroyed at the end of the contract. If true, this violated 44 U.S.C. 3105.

CONCLUSION

EPA failed to make and preserve documentation of significant decisions and activities in accordance with laws, regulations, and policy. Such documentation was needed to protect the legal and financial rights of the Government. The conflicting statements by EPA officials further demonstrate the importance of documentation.

RECOMMENDATIONS

We recommend the Deputy Administrator:

6-1) Review whether any employee conduct violations occurred and whether disciplinary action is warranted under EPA Employee Responsibility and Conduct regulations and related policies and procedures against officials who violated the Federal Records Act and the Records Disposal Act by concealing, removing, or destroying any records or documents.

6-2) Hold Agency personnel accountable for the maintenance of all documents related to decisions and input into the decision making process.

We recommend the Acting Assistant Administrator for Administration and Resources Management:

6-3) Provide training to Senior Level Managers, Contracting Officers, Project Officers, and other staff with contracting duties on the Federal Records Act, the Record Disposal Act, implementing regulations, and EPA policy affecting the retention of records.

6-4) Initiate a review of other EPA contracts to identify documentation problems and ensure adequate corrective action is taken.

AGENCY COMMENTS AND OIG EVALUATION

OARM Response to Recommendations 6-1 & 6-3 (Draft Report6-1 and 6-2)

The response by OARM generally agreed with the findings and the recommendations. OARM's response in its entirety is contained in Appendix III.

The OIG has not, at this time, made available for Agency review certain Office of Audit work product materials. The OIG has advised us (1) that our access to such materials would not advance resolution of any audit report findings, and (2) that the materials at issue are potentially only germane to a determination of whether, and to what extent, personnel actions might be appropriate.

It is our understanding that, after all other audit issues are resolved, the OIG will make available to us its work product materials relevant to the personnel issue. Once the OIG has released such information, OARM will review it and take appropriate personnel actions as warranted.

OIG Evaluation

The actions planned by OARM should meet the intent of the recommendations. We will provide access to the documents required after all audit report issues are resolved.

OARM Response to Recommendation 6-2 (Draft Report 6-3)

OARM agreed that training regarding the Federal Records Act and related requirements would be valuable. OARM will develop record keeping requirements for documenting important decisions and conduct training to all level of employees.

OIG Evaluation

The actions planned by OARM should fulfill the intent of the recommendation. No further action is required.

OARM Response to Recommendation 6-4

Beginning in FY 1997, the Office of Acquisition Management (OAM) will review, by program office, a representative sampling of contracts for potential documentation problems.

OIG Evaluation

The action planned by OAM should alleviate the problem. We request that OAM forward to us the results of its review.

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